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No. 92-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

FELICE LIPPERT,
Petitioner,

v.

DELTA AIR LINES, INC., and
THE WACKENHUT CORPORATION,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an airline's liability for property lost at an airport security checkpoint operated by the airline is limited by its federal tariff.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Felice Lippert seeks review of the Supreme Court of Florida's holding that an airline's federal tariff preempts its normal state-law liability for damages for losing a passenger's carry-on handbag at a security checkpoint inside the airline terminal.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (App., *infra*, at 1a-11a) is reported at 609 So. 2d 1304. The opinions of the District Court of Appeal (App., *infra*, at 12a-19a, 20a-21a) are reported at 591 So. 2d 215 and 219.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on December 3, 1992. App., *infra*, at 1a. A timely petition for rehearing was denied on January 13,

1993. App., *infra*, at 26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

FEDERAL REGULATIONS AND TARIFF INVOLVED

The United States Department of Transportation's regulations governing domestic baggage liability (14 C.F.R. pt. 254) provide in pertinent part:

14 C.F.R. § 254.1

> The purpose of this part is to establish rules for the carriage of baggage in interstate and overseas air transportation. The part sets permissible limitations of air carrier liability for loss, damage, or delay in the carriage of passenger baggage and requires air carriers to provide certain types of notice to passengers.

14 C.F.R. § 254.4

> In any flight segment using large aircraft, or on any flight segment that is included on the same ticket as another flight segment that uses large aircraft, an air carrier shall not limit its liability for provable direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passenger's personal property, including baggage, in its custody to an amount less than $1250 for each passenger.

14 C.F.R. § 254.5

> In any flight segment using large aircraft, or on any flight segment that is included on the same ticket as another flight segment that uses large aircraft, an air carrier shall provide to passengers, by conspicuous written material included on or with its ticket, either:
>
> (a) Notice of any monetary limitation on its baggage liability to passengers; or
>
> (b) The following notice: "Federal rules require any limit on an airline's baggage liability to be at least $1250 per passenger."

Rule 190 of Delta Airlines' published tariff, filed with the Department of Transportation pursuant to 49 U.S.C. § 1373, provides in pertinent part (Airline Tariff Publishing Co., Domestic General Rules Tariff No. DGR-1, Delta Airlines, DL-23 to DL-24): [1]

J) *BAGGAGE LIABILITY*

1) a) DL shall be liable for the loss of, damage to, or delay in the delivery of a fare-paying passenger's baggage, or other property (including carry-on baggage, if tendered [to DL's inflight personnel for storage during flight or otherwise delivered] into the custody of DL). Such liability, if any, for the loss, damage or delay in the delivery of a fare-paying passenger's baggage or other property (whether checked or otherwise delivered in to the custody of DL), shall be limited to an amount equal to the value of the property, plus consequential damages, if any, and shall not exceed the maximum limitation of USD 1250.00 for all liability for each fare-paying passenger (unless the passenger elects to pay for higher liability as provided for in Paragraph 3) below). The passenger shall not be automatically entitled to USD 1,250.00 but must prove the value of losses or damages. Actual value for reimbursement of all lost or damaged property shall be determined by the documented original purchased price less any applicable depreciation for prior usage. These limitations also shall apply to baggage or personal property ac-

[1] A few differences exist between the version of the tariff in effect at the time this case arose and the current tariff. These differences are indicated by brackets, which enclose the new, now-current wording.

cepted by DL for temporary storage at a city or airport ticket office or elsewhere before or after the passenger's trip.

* * * *

EXCEPTION [2]:

The above maximum liability shall be waived for an individual claimant where it can be shown that with respect to that claimant DL failed to provide notice of limited liability for baggage.

NOTE:

Any failure to enforce the maximum limitations of liability at USD 1250.00 shall not be construed as a waiver of the right to limit liability at some higher amount.

* * * *

2) *Exclusions from Liability*

* * *

e) DL is not responsible for jewelry, cash, camera equipment, or other similar valuable items contained in checked or unchecked baggage, unless excess valuation has been purchased. These items should be carried by the passenger.

3) *Declaration of Higher Value*

a) A passenger may, when checking in for a flight and presenting property for transportation, pay an additional charge (see chart below) and declare a value higher than the maximum amounts specified . . . above and up to the maximum specified in b) below, in

which event, DL's liability shall not exceed such higher declared value. . . .

* * *

b) *Limits on Declared Higher Value*

The declared value for personal property, including baggage, shall not exceed USD 5,000.00.

STATEMENT

The Supreme Court of Florida held that the $1250 limit for loss of baggage in a federal tariff governing air carriage applied to preempt the airline's normal liability under state law for negligence in losing a passenger's carry-on handbag as she and her property went through a security checkpoint, through which non-passengers also freely passed, operated by the airline's agent in the airport. Petitioner challenges that ruling.

1. *Background*

On March 8, 1986, petitioner Felice Lippert and her husband arrived at the Palm Beach International Airport to board a flight provided by respondent Delta Airlines. After checking their baggage at curbside, they walked into Delta's terminal and proceeded to the security checkpoint through which they had to pass to enter the waiting area at the gate. The checkpoint was operated by respondent Wackenhut Corporation as an agent of Delta's. Respondents allowed both passengers and non-passengers alike to pass through the security checkpoint into the waiting area. R. 365.

The security checkpoint consisted of the usual two machines: an archway through which people walked to be checked for metal; and a large, enclosed magnetometer scanner through which carry-on items ran on a conveyor belt. The person whose carry-on items were placed on the conveyor belt could not see them while they were inside the scanner. Nor could the items be seen from

the archway once they were deposited by the conveyor belt at the far end of the scanner. The pick-up area was blocked from the view of anyone not standing at or near that end of the scanner. *See* R. 279, 427, 597, 598, 610-11, 619.

A total of six security people were on duty at or around the scanner. R. 238, 421. Yet there was "no one stationed at the end of the magnetometer to watch who picks up a particular parcel or property" (Delta/Wackenhut Br. in Fla. S. Ct. at 3, citing R. 236, 260, 276). Nor was the screening process conducted so as to ensure that individuals would be able to place their carry-on items on the conveyor belt for scanning, walk through the archway, and proceed toward the far end of the scanner to pick up their carry-ons *before* other individuals could proceed ahead of them and possibly pick up a stranger's bag. *See* R. 368-69.

When Mrs. Lippert arrived at the security checkpoint, she handed two small handbags to a Wackenhut employee, who placed them on the conveyor belt of the scanner. Mrs. Lippert walked through the archway, but because it beeped, she was required to walk through again; she did, and no beep sounded. R. 649-50. Mrs. Lippert walked to the far end of the scanner, where no security employees were stationed. There, she found only one of the carry-on bags waiting to be reclaimed; the other was missing and was never seen again. R. 650.

The missing handbag contained jewelry valued at more than $400,000. R. 793. Mrs. Lippert and her husband proceeded frantically to search for the bag, checking at other gates, in restrooms, and with Delta employees, boarding the aircraft to inquire about the bag, and filing a lost-baggage report. R. 81-88. Mrs. Lippert and her husband, though holding tickets, did not take the flight.

2. *Proceedings*

a. On April 1, 1986, Mrs. Lippert filed a complaint in state court in Florida, seeking damages under Florida law against Delta and its agent Wackenhut for their negligence in causing the loss of her property while entrusted to them for the security check. App., *infra*, at 29a-32a.[2] Delta and Wackenhut answered, among other things, that their liability was limited to $1250 by federal law—specifically, the baggage-liability limitation contained in the federal tariff published by Delta and incorporated into Mrs. Lippert's ticket. *See* App., *infra*, at 13a-14a. The trial court agreed with that argument and entered partial summary judgment limiting any liability to $1250. *See ibid.*

Delta and Wackenhut also argued that, under state law, they should not be held liable *at all*, partly because Mrs. Lippert could not prove that the lost bag contained the claimed jewelry and partly because they urged that a gross negligence (as opposed to ordinary negligence) standard governed their liability. Shortly before the trial on these claims in the fall of 1989, two pieces of the jewelry identified by Mrs. Lippert—namely, a pair of earrings—were recovered. Though in altered form, the earrings turned up at an auction at Sotheby's in New York. R. 178. The jury, which was instructed to determine the actual loss incurred, returned a verdict for Mrs. Lippert in the amount of $431,609. *See* App., *infra*, at 22a.

The trial court initially entered judgment for that amount (plus interest) while, in the same order, staying execution of the judgment to allow Mrs. Lippert to appeal the pre-trial partial summary judgment limiting damages to $1250. *Id.* at 22a-23a. Subsequently, the trial court amended that judgment. The modified final judg-

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[2] Mrs. Lippert's husband was named as a plaintiff as well, but he was eventually dropped from the suit.

ment set aside the pre-trial partial summary judgment and entered a final judgment for the full amount awarded by the jury. *Id.* at 24a-25a.

On appeal, the District Court of Appeal held that the $1250 liability limit in Delta's federal tariff did not apply to this case. App., *infra*, at 12a-19a. Explaining that "the passenger, in carrying the handbag, is acting in compliance with the provision of the tariff [Rule 190 (J)(2)(e)] which states that valuables should be carried," the court concluded that "the tariff and its limitation on liability do not apply where the passenger is forced to relinquish possession of his or her valuables for the purpose of a security magnetometer check." App., *infra*, at 17a. The court ordered a new trial, however, because it thought that respondents were prejudiced by the trial judge's statements to the jury that judgment could not be entered for more than $1250. *Id.* at 18a.[3] The court then certified to the Florida Supreme Court the legal question of the effect of the federal tariff on Mrs. Lippert's right to full recovery. *Id.* at 19a.

b. A divided Florida Supreme Court held the $1250 limitation applicable to limit respondents' liability as a matter of federal law. App., *infra*, at 1a-11a. After concluding initially that the carry-on bag was "baggage" within the meaning of the ticket's definition (*id.* at 7a, referring to *id.* at 4a (quoting definition)), the court turned to the tariff and held that the carry-on handbag was within the coverage of Rule 190(J)(1)(a) of Delta's [DL's] tariff, which acknowledges (then limits) liability as to "a fare-paying passenger's baggage, or other property (including carry on baggage . . . otherwise delivered into the custody of DL.)," *i.e.*, "a fare-paying passenger's baggage or other property (whether checked or otherwise

[3] The court also ordered that, on retrial, the issue of collateral source recovery should be dealt with in accordance with a recent pronouncement of the Florida Supreme Court. *See* App., *infra*, at 18a; *id.* at 21a (on rehearing).

delivered in to the custody of DL)." App., *infra*, at 7a-8a, referring to portions of tariff provision highlighted at *id.* at 5a-6a. The court's entire explanation was this: "Clearly, Ms. Lippert's handbag was delivered into the custody of Delta at the security checkpoint. At that time she was a ticketed passenger, so the baggage liability limitation was applicable." *Id.* at 8a. And the liability limit applied to passengers like Mrs. Lippert, the court said, even though it could not limit Delta's liability for the same negligence at the security checkpoint as to *non*-passengers walking through with passengers. *Ibid.*

Having found respondents' liability preempted by federal law to the extent it exceeded $1250, the court held that liability was proper under the state law of bailment. App., *infra*, at 9a. Because of the $1250 limit, the court found moot the issue whether a new trial was warranted based on the trial judge's statements to the jury about limited damages. *Ibid.* The court accordingly ordered that judgment be entered in favor of Mrs. Lippert for $1250. *Ibid.*

Justice Kogan dissented from the majority's preemption ruling. App., *infra*, at 10a-11a. He concluded that "[t]he tariff is at best ambiguous on this question, and there is no good reason in law or policy to avoid construing the ambiguity so as to achieve the most logical and fair result." *Id.* at 11a. He explained that he would adopt "the district court's well reasoned conclusion that the tariff and its limitations are not applicable when a passenger relinquishes belongings for a security check prior to boarding aircraft." *Id.* at 10a.

REASONS FOR GRANTING THE PETITION

This case presents the straightforward question whether the limits on liability contained in an airline's federal tariff apply to property lost at a security checkpoint operated by the airline. The question is one of federal law. *Great Northern Ry. v. Merchants' Elevator Co.*,

259 U.S. 285, 290-91 (1922); *see Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656, 665-66 (1961).[4] And given that more than 400 million passengers pass through security checkpoints each year in the United States, and are subject to virtually identical tariffs, it is an issue of considerable importance.

The Florida Supreme Court's holding that the limit on liability does apply, and that state law was thus preempted, is incorrect. The court read one sentence of the tariff to limit liability for all property put by a passenger into the custody of the airline—whether for transportation or not, whether voluntarily or not. But another part of the tariff, ignored by the court, makes absolutely clear that the relied-on sentence does no such thing—and that the federal limit applies only to property delivered to the airline's custody for transportation, or for temporary storage before or after a flight—neither of which occurs at security checkpoints in the airport. Moreover, the court below made no effort to square its reading with other sections of the tariff setting the conditions for purchasing additional coverage and specifically instructing that passengers should do just what petitioner did: personally carry property (like jewelry) for which the airline disclaimed responsibility. The result is a decision that, contrary to established law, construes a tariff in favor of the airline that drafted it and that, again contrary to established law, exhibits little caution in preempting traditional principles of liability under state law.

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[4] Justice Brandeis, speaking for a unanimous Court in *Great Northern Railway*, explained: "Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured." 259 U.S. at 290-91, quoted with approval in *Pan American*, 366 U.S. at 665-66.

The ruling potentially affects every passenger embarking on a domestic flight. Although this case involves the tariff filed by Delta Airlines, the tariffs of other airlines are not materially different. At the very least, passengers required to surrender their property at a security checkpoint should know, one way or the other, whether they retain their complete state-law remedy if the airline operator negligently allows another person to take their property. This Court should grant review to resolve that important question.

I. FEDERAL LAW DOES NOT LIMIT THE AIRLINE'S LIABILITY FOR LOSSES AT ITS AIRPORT SECURITY CHECKPOINT.

The sole basis for the Florida Supreme Court's finding (and respondents' urging) of preemption of liability under state law is the tariff filed by Delta with the United States Department of Transportation. But that tariff, whose terms are common throughout the industry, is not properly read to cover carry-on baggage passing through a security checkpoint in the airport. Rather, it applies only to baggage given into the airline's custody for either of two purposes—to transport; or to store temporarily before or after a flight—neither applicable at a checkpoint. This not only is the evident meaning of the tariff but is reinforced by applicable law that requires particular clarity before a federal limit on the airline's state-law liability may be found.[5]

a. The relevant language limits liability in two places, both in the single paragraph of Rule 190(J)(1)(a). First, the opening sentences acknowledge liability for "a fare-

[5] Petitioner does not challenge the application of the airline's liability limit to the airline's agent, respondent Wackenhut Corporation. *Cf. Chutter v. KLM Royal Dutch Airlines*, 132 F. Supp. 611 (S.D.N.Y. 1955) (Warsaw Convention); *Julius Young Jewelry Mfg. Co. v. Delta Air Lines*, 67 A.D.2d 148, 414 N.Y.S.2d 528 (1st Dep't 1979) (same).

paying passenger's baggage, or other property (including carry-on baggage, if tendered into the custody of DL)," then immediately limit "[s]uch liability" for the same items—*i.e.*, for "a fare-paying passenger's baggage or other property (whether checked or otherwise delivered into the custody of DL)." Second, the final sentence of the same paragraph states that "[t]hese limitations also shall apply to baggage or personal property accepted by DL for temporary storage at a city or airport ticket office or elsewhere before or after the passenger's trip." But neither of these limits of liability applies to the airline's momentary possession of passenger carry-on items as they pass through a security checkpoint.

The limit stated in the last sentence of the paragraph, applying to the airline's custody of property for temporary storage, obviously does not apply here. The airline's brief custody for the security check is not for storage, temporary or otherwise. Nor is such custody restricted to passengers, much less before or after a flight. Thus, as the Florida Supreme Court implicitly recognized, the last sentence of Rule 190(J)(1)(a) provides no basis for limiting respondents' liability under state law.

The court below relied entirely on the opening sentences of Rule 190(J)(1)(a), but in construing those sentences, it mistakenly ignored the critical relevance of the temporary-storage provision. That provision makes absolutely clear that the opening sentences cannot be read to apply, as the Florida Supreme Court held, *whenever* the airline takes custody of a ticketed passenger's bags. Quite simply, that reading renders the temporary-storage provision wholly pointless: if *any* airline custody of a passenger's property—no matter where, for what purpose, or for how long—were already covered by the liability limit stated in the opening sentences of Rule 190 (J)(1)(a), the addition of a liability limit for temporary storage at the end of the paragraph would be mere surplusage.

The scope of the limitation in the opening sentences therefore must be narrower than the Florida Supreme Court concluded. And the evident basis for circumscribing the scope of this limitation, as with the temporary-storage provision, is the airline's purpose in having custody of passenger property. Just as the last sentence reaches only airline custody for the airline's *storage* of such property, the first sentences naturally reach only airline custody for the airline's *transportation* of such property. That is not what the airline does at a security checkpoint.

Where the Florida Supreme Court erred was in completely disconnecting the two elements required for application of the basic liability limit: a passenger with a ticket for air transportation; and airline custody of the passenger's bags. Unless these two requirements are linked, the liability limit would apply to a person who came to the airport to see off a friend, passed through a security checkpoint on the way to the waiting area, and had her briefcase or handbag taken through the negligence of the airline—*if* she happened to hold a ticket for a flight a week, a month, or a year later (on which, of course, she might not be taking that bag at all). Such a result is absurd, because the custody of the bag has nothing to do with the ticket for air transportation; such a person is no different from any *non*-ticketed individual passing through a security check, who, as the Florida Supreme Court agreed, would *not* be subject to any liability limit. App., *infra*, at 8a.[6] In short, the opening sentences defining the airline's liability limit make sense only if their subject is the airline's custody of the bags *for* its transportation of the ticketed passenger's baggage, which

[6] Among the problems that would arise from the Florida Supreme Court's ruling is that if (in the above example) the individual had two tickets, one for a domestic flight and another for an international flight, a court would have to decide whether the domestic limits under the tariff applied ($1250) or the quite different international limits (measured in French francs) under the Warsaw Convention (*see* 49 U.S.C. § 1502 Note).

is not the airline's purpose in taking custody at a security check.

This reading is reinforced by several additional, related aspects of the tariff. Rule 190(J)(3) indicates that the limitation on liability applies only where the passenger can purchase higher coverage; but that coverage is available only when "presenting property *for transportation*" (Rule 190(J)(3)). And even if that language theoretically allowed purchase of higher coverage solely for the security check, as a practical matter it is hardly reasonable to expect a passenger to buy additional coverage simply to pass through a security checkpoint, when she intends to keep her carry-on bag with her on board (the retention of custody meaning that, by its terms, the liability limitation of the opening sentences of Rule 190(J)(1)(a) would not apply to the flight).[7] The tariff does not fairly contemplate application of a liability limit to the involuntary submission of carry-on items at a required security checkpoint.

The provision whereby Delta purports to exclude liability altogether for jewelry (which Delta has not invoked) further indicates that the liability limits do not apply here. The provision draws a distinction between what is "carried by the passenger" herself and "checked or unchecked baggage," suggesting that carry-on items are outside the airline's liability and, therefore, the limitation that applies to "[s]uch liability" (Rule 190(J)(1)(a), second sentence). *See* Rule 190(J)(2)(e). Beyond that, the provision disclaims any airline responsibility for valuables like jewelry. It is hardly a sensible reading of the tariff to say that the airline may steer clear of any responsibility for such items by insisting that the passenger not give them into its custody, then turn around and invoke a liability limit when it requires that such items actually be handed over—momentarily,

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[7] Those sentences carefully decline to include all carry-on items in their coverage. Carry-on baggage is included *only* "if tendered" or "delivered" "into the custody" of Delta.

but long enough to be lost. It is particularly unreasonable when the airline has affirmatively advised passengers how to protect their valuables: "[t]hese items should be carried by the passenger." Rule 190(J)(2)(e).[8]

b. Even if there were doubt about the proper meaning of the tariff, any such doubt must be resolved against the Florida Supreme Court's interpretation. One reason is the longstanding general principle that federal tariffs are to be construed against their drafter—here, the airline. *Penn Central Co. v. General Mills, Inc.*, 439 F.2d 1338, 1341 (8th Cir. 1971). There are other, more specific reasons as well.

The Department of Transportation regulations that govern such limitations of liability (14 C.F.R. pt. 254) focus on the airline's actual "carriage" of baggage in "air transportation" (14 C.F.R. § 254.1), authorizing a $1250 liability limit for baggage "in its custody" while "in any flight segment" (*id.* § 254.4). Although these regulations might perhaps be read to permit limitation of liability for temporary storage immediately before or after air transportation, they cannot fairly be read, without extreme stretching, to authorize a liability limitation whenever a ticketed passenger gives her property into the

[8] The ticket issued by Delta—which has no independent significance as a limitation of liability but (necessarily, under 49 U.S.C. App. § 1373) simply incorporates the tariff limitations—lends further support to the natural reading of the tariff as concerned only with custody for transportation (or temporary storage). The ticket defines "baggage" as "any article or other property of passengers which is acceptable for transportation under the conditions of contract stated herein, whether checked in the cargo compartment or carried in the cabin of the aircraft." *See* App., *infra*, at 4a (quoting ticket). It may be possible to parse that definition literally to encompass any property that *could* be carried in an aircraft, as the Florida Supreme Court did, but its unmistakable focus is on the airline's actual transportation. That focus underscores the *tariff*'s focus on the airline's transportation of property, as opposed to its handling of passenger property for other purposes (except for temporary storage, as specifically added to the tariff).

custody of the airline, as the Florida Supreme Court held. Indeed, if no link at all were required between the custody and the air transportation, the federal tariff would go beyond Congress's explicit authorization of preemption of state law duties, 49 U.S.C. App. § 1305(a)(1). *See Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). An interpretation of the tariff that avoids breaking, or even testing, the limits of statutory and regulatory authority is to be preferred.

This is particularly so with respect to a limitation of liability, which federal law has long distinctly disfavored. *See United States v. Atlantic Mut. Ins. Co.*, 343 U.S. 236, 239 (1952). Federal common law principles have thus long recognized that such liability limits are enforceable only if individuals have clear notice and a clear opportunity to avoid the limits by paying a higher charge. *See New York, N.H. & Hartford R. Co. v. Nothnagle*, 346 U.S. 128, 135 (1953); *Deiro v. American Airlines, Inc.*, 816 F.2d 1360, 1365 (9th Cir. 1987); *First Pennsylvania Bank, N.A. v. Eastern Airlines, Inc.*, 731 F.2d 1113, 1117 (3d Cir. 1984). Moreover, that principle is specifically embodied in the Department of Transportation's regulation requiring clear notice of any limitation of liability. 14 C.F.R. § 254.5. Yet Delta's tariff, however it *could* be read, hardly gives clear notice that its liability limitation applies to carry-on bags at a security checkpoint inside the airport. In the absence of such clarity, its liability-limitation provisions must be construed not to restrict the airline's legal liability.

Preemption principles further reinforce this conclusion. The effect of the federal tariff, as respondents have insisted throughout this case, is to preempt state law—here, compensatory remedies under traditional state law. The presumption against preemption (*see Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) counsels in favor of resolving any ambiguity *against* such preemp-

tion. Indeed, if that presumption counsels caution in inferring preemption when *Congress* acts (*ibid.*) and when a federal *agency* acts (*see California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583-84 (1987); *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 714, 717-18 (1985)), the presumption must be all the stronger when it is a *private party*, through the drafting and filing of a tariff, that produces the preemption. Certainly, as the dissent below concluded, nothing about the tariff here possesses the sort of clarity required to justify the preemption of respondents' state-law liability to Mrs. Lippert.

II. THE RULING BELOW WARRANTS THIS COURT'S REVIEW.

The decision of the Florida Supreme Court warrants this Court's review, not only because it is wrong, but because it will have an immediate and widespread adverse impact throughout the Nation. More than 400 million passengers board domestic flights, and therefore pass through x-ray scanners at airports, every year in the United States. *See* Air Transport Ass'n of America, *Air Transport 1992* at 1. Most if not all of these passengers will be affected by the decision below.

Delta itself is one of the major airlines, with more than 70 million passengers each year (*Air Transport 1992* at 7); it will certainly attempt to follow the Florida Supreme Court's interpretation of its tariff nationwide (except, perhaps, for New York, *see* p. 20, *infra*). Other airlines will undoubtedly follow this interpretation as well, because Delta's tariff provisions are hardly unique. Indeed, all the major airlines' basic tariff provisions governing limitations on liability for baggage provisions use language that is either essentially identical to or at least as general as Delta's. Under these provisions, just as under Delta's tariff, passengers on the major airlines will now be subject to the same limits of liability as they are on

Delta.[9] The nearly uniform tariffs are the practical equivalent of a federal regulation.

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[9] This is so for every airline that carries more than 10 million passengers annually. *See* America West Airlines Rule 230(A)(1) & (3), (C) (limit applies to "personal property, baggage (whether such property has been checked or otherwise delivered into the custody of the carrier)"; refuses storage of baggage; higher coverage available "when presenting property for transportation"); American Airlines Rule 190(C) (limit for "baggage, or other property (whether checked or otherwise delivered into the custody of the carrier)"; also "for temporary storage"; higher coverage available when "presenting property for transportation"); Continental Airlines Rule 230(A), (B)(3), (C) (liability limit "for checked baggage"; exclusion of liability "for baggage, or other items, carried in the passenger compartment of the aircraft"; higher coverage available when "presenting property for transportation"); Northwest Airlines Rule 190(A) ("any personal property or baggage (whether such property has been checked or otherwise delivered into the custody of NW)"; higher coverage available when "presenting property for transportation"); TWA Rule 230(A) & (C) ("baggage or other property (whether checked or otherwise delivered into the custody of the carrier)"; limit also applies to baggage accepted "for temporary storage"; higher coverage when "presenting property for transportation"); United Airlines Rule 190(D)(1) & (3) ("any personal property, baggage (whether such property has been checked or otherwise delivered into the custody of the carrier)"; higher coverage available when "presenting property for transportation"; Rule 190(A)(4) provides that United "will not accept baggage or other personal property for storage"); USAir Rule 230(A) (liability for "passenger baggage" limited to $1250; higher coverage available).

The only other airline with more than 10 million passengers annually is Southwest, which operates under the general tariff applicable to airlines without their own tariffs. That tariff is similar as well. Rule 230(A) & (C) ("baggage or other property" "whether checked or otherwise delivered into the custody of the carrier"; also applicable to bags "accepted by the carrier for temporary storage at a city or airport ticket office, or elsewhere before or after the passenger's trip"; additional coverage when "presenting property for transportation").

All of these provisions are set out in the Airline Tariff Publishing Company's compilation of Domestic General Rules Tariff No. DGR-1 for federally certificated airlines.

These limitations, as now construed, override fundamental state-law protections of passengers and their property as a matter of federal law, and thereby place passengers at risk of serious loss. Every passenger who places a briefcase or purse or other hand-carried bag containing valuables onto a conveyor-belt scanner will be subjected to the possibility of uncompensated loss as she passes through sloppily run security checkpoints. Many passengers have no choice but to submit their property to this risk—perhaps disproportionately more women, whose attire often contains fewer pockets for carrying valuables and who, therefore, often cannot keep their valuables in sight as they walk through the archway metal detector (by placing them in a tray on a table next to the archway). Although passengers take their valuables in carry-ons, rather than check them, precisely in order to keep them under personal control, they are required to turn them over temporarily for the security check. Yet the airlines responsible for such checkpoints, relieved of any liability beyond $1250, will have little incentive to take simple precautions, such as insisting that individuals proceed through the checkpoints one at a time, to ensure that the person whose carry-on bag enters the scanner is the person who picks it up at the other end.

The Florida Supreme Court's decision not only departs from the interpretive principles applied in circuit-court decisions such as *Deiro* and *Penn Central*, cited above, but as the court itself acknowledged (App., *infra*, at 8a), conflicts in its specific holding with the one other decision to have addressed this issue—in virtually identical circumstances. *Tremaroli v. Delta Airlines*, 117 Misc. 2d 484, 458 N.Y.S.2d 159, 162 (Civ. Ct. 1983) (Delta's tariff liability limit held inapplicable to airline's careless handling of passenger's carry-on bag at security checkpoint inside airport).[10] This conflict, though of course

[10] The Florida Supreme Court cited two other decisions (App., *infra*, at 8a), but they plainly involved different issues. The first,

not involving another state supreme court or a federal court of appeals, nevertheless warrants this Court's review for three related reasons. First, as a matter not just of precedent but perhaps of affirmative collateral estoppel, the New York decision should forbid respondent Delta to apply the liability limit in the future to security checkpoints in New York. The conflict thus places Delta in the position of treating New York passengers differently from its passengers in Florida and elsewhere, a form of discrimination that, indeed, runs into the statutory prohibition of 49 U.S.C. App. § 1373. Second, there is no reason to expect the conflict to disappear. Third, the absence of other decisions does not imply that the issue is unimportant; rather, the paucity of decided cases is likely attributable to the fact that the amount involved in such losses will only rarely justify the costs of pursuing a lawsuit as far as this one. This case thus presents an unusual opportunity to resolve an issue that will affect many people, and thereby to prevent airlines like Delta from exploiting passengers who incur smaller losses at badly operated security checkpoints.

Baker v. Lansdell Protective Agency, Inc., 590 F. Supp. 165 (S.D.N.Y. 1984), involved interpretation not of a federally filed tariff but of the Warsaw Convention. The court there held that the Convention's language applying to activities "in the course of any of the operations of embarking or disembarking" covered a security checkpoint through which passengers (and *only* passengers) proceeded directly on their way to boarding. *Id.* at 169-70. And the court *rejected* the argument that the bag, momentarily handed to the security personnel, was thereby placed "in the custody of the carrier" for purposes of another liability-limiting provision of the Convention. *Id.* at 168. The second case cited by the Florida Supreme Court, *Feature Enters., Inc. v. Continental Airlines*, 745 F. Supp. 198 (S.D.N.Y. 1990), involved a bag that was *checked* with the airline for transportation—precisely what the federal tariff here plainly covers. Thus, neither case supports the ruling below in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 13, 1993

APPENDICES

APPENDIX A

SUPREME COURT OF FLORIDA

No. 78,957

THE WACKENHUT CORPORATION, ETC., *et al.*,
Petitioners,
Cross-Respondents,

vs.

ALBERT LIPPERT, *et ux.*,
Respondents,
Cross-Petitioners.

[December 3, 1992]

GRIMES, J.

We review *Wackenhut Corp. v. Lippert*, 591 So. 2d 215, 219 (Fla 4th DCA 1991), in which the court certified the following as a question of great public importance:

> WHERE A POSTED TARIFF IN CONJUNCTION WITH THE TICKET FOR CARRIAGE ON A COMMON CARRIER LIMITS LIABILITY FOR CHECKED BAGGAGE OR BAGGAGE ULTIMATELY DELIVERED TO A FLIGHT ATTENDANT FOR STOWAGE IN THE CABIN, BUT THE PASSENGER CHOOSES INSTEAD TO RETAIN CUSTODY OF A PACKAGE, PURSE, HANDBAG, ETC., AND THE PASSENGER IS THEN REQUIRED TO RELINQUISH POSSES-

SION OF THE ITEM FOR THE PURPOSES OF X-RAY OR OTHER EXAMINATION OR INSPECTION, DOES THE CARRIER'S TARIFF LIMIT ITS LIABILITY, OR THAT OF ITS AGENTS, FOR ORDINARY NEGLIGENCE RESULTING IN LOSS TO THE PASSENGER DURING THE X-RAY OR INSPECTION PROCESS?

We have jurisdiction under article V, section 3(b)(4) of the Florida Constitution.

Felice Lippert and her husband bought tickets on a Delta Airlines' flight from West Palm Beach to New York. On her way to board the flight, Ms. Lippert took a handbag containing valuable jewelry through a security checkpoint at Palm Beach International Airport. Because this portion of the airport was designated exclusively for Delta flights, Delta was responsible for maintaining the checkpoint. Delta contracted with the Wackenhut Corporation to act as its agent in the operation of the checkpoint. The checkpoint included a magnetometer scan of baggage and other carry-on items as well as a scan of the person that occurs as the person walks through a specially designed archway. Ms. Lippert placed her bag on the conveyor belt as required and walked through the archway. When the archway magnetometer alarm sounded, Ms. Lippert was briefly inspected by Wackenhut personnel. She then walked forward to collect her handbag containing the jewelry at the end of the conveyor, but it was missing. A search of the area for the missing handbag was unsuccessful.

Ms. Lippert sued Delta and Wackenhut for the value of the lost jewelry. As an affirmative defense, Delta and Wackenhut asserted a $1250 limitation on liability which is set forth on her ticket and on Delta's published tariff. The trial judge initially entered a partial summary judgment for Delta and Wackenhut, upholding the limitation on liability to the maximum amount of $1250. The judge reasoned that Ms. Lippert had delivered her prop-

erty into Delta's custody through its agent, Wackenhut, and had thereby invoked the liability limitation. At the time of trial, a new judge was assigned to the case. The second judge permitted the jury to consider the total amount of damages claimed by Ms. Lippert, though throughout the trial the judge remarked that he would be bound to enter a final judgment for no more than $1250 despite the jury's verdict. The jury returned a verdict in favor of Ms. Lippert for $431,000. At this point, the judge changed his mind regarding the applicability of the liability limitation and entered a final judgment against both defendants for $431,000.

The district court of appeal held that the limitation on liability contained in the ticket and the tariff did not apply under the facts of the case. The court also found that a bailment for the mutual benefit of both the passenger and the airline had been created when Ms. Lippert relinquished possession of her valuables to go through the x-ray machine. Therefore, the trial court was correct in applying the ordinary negligence standard. However, the court felt that the defendants had been unduly prejudiced by the judge's assurances throughout the pretrial proceedings and the trial that the potential judgment could not exceed $1250. Thus, the case was remanded for a new trial with the proviso that the limitation of liability would not apply.

On petition for review in this Court, Delta and Wackenhut argue for the $1250 limitation. In addition, they contend that, because the airport security check was mandated by law, they were gratuitous bailees, who could only be held liable if grossly negligent. Ms. Lippert cross-petitions to review the granting of a new trial.

The airline ticket purchased by Ms. Lippert provided in pertinent part:

NOTICE OF INCORPORATED TERMS

Air transportation to be provided between points in the U.S. (including its overseas territories and possessions) is subject to the individual contract terms (including rules, regulations, tariffs and conditions) of the transporting air carriers, which are herein incorporated by reference and made part of the contract of carriage. Foreign air transportation is governed by applicable tariffs on file with the U.S. and other governments. Incorporated terms may include, but are not restricted to:

. . . .

2. *Limits on liability for baggage, including fragile or perishable goods and availability of excess valuation coverage.*

DELTA AIR LINES' CONDITIONS OF CONTRACT

The following conditions of contract supersede the Conditions of Contract on the reverse side of the Passenger's Coupon and apply on all flight segments via Delta Air Lines.

1. *Definitions*—As used in this contract, "ticket" means this passenger ticket and baggage check of which these conditions and notices form part; "carriage" is equivalent to "transportation"; *"baggage" means any article or other property of passengers which is acceptable for transportation under the conditions of contract stated herein, whether checked in the cargo compartment or carried in the cabin* of the aircraft; "Delta ticket office" means a ticket sales location of Delta or the office of one of its appointed Travel Agents; "tariffs" mean printed or electronically stored rules and regulations established by Delta governing the acceptance and carriage of Passen-

gers and baggage including applicable fares, rates and charges for such carriage . . . .

7.C. *Baggage Claim Limits and Procedures*

(1) DOMESTIC (including U.S.A.-Puerto Rico) Total liability for each passenger's checked baggage—including liability for provable direct or consequential damages —is limited to $1250.00 in the event of loss, damage or delay, unless a higher value is declared in advance and additional charges are paid. . . .

NOTICE OF BAGGAGE LIABILITY LIMITATIONS

Liability for loss, delay, or damage to baggage is limited as follows unless a higher value is declared in advance and additional charges are paid: . . .

(2) For travel wholly between U.S. points to $1,250 per passenger on most carriers (a few have lower limits). . . .

(Emphasis added.)

Delta's published airline tariff stated in pertinent part:

J) *BAGGAGE LIABILITY*

1) a) DL shall be liable for the loss of, damage to, or delay in the delivery of a fare-paying passenger's baggage, *or other property (including carry on baggage,* if tendered to DL's in flight personnel for storage during flight or *otherwise delivered into the custody of* DL.) *Such liability, if any, for the loss, damage or delay in the delivery of a fare-paying passenger's baggage or other property (whether checked or otherwise delivered*

> *into the custody of DL)*, shall be limited to an amount equal to the value of the property plus consequential damages, if any, and shall not exceed the maximum limitation of USD 1250.00 for all liability for each fare-paying passenger (unless the passenger elects to pay for higher liability as provided for in paragraph 3) below). The passenger shall not be automatically entitled to USD 1,250.00 but must prove the value of losses or damages.
>
> . . . .
>
> 2) *Exclusions From Liability*
>
> . . . .
>
> e) DL is not responsible for jewelry, cash, camera equipment, or other similar valuable items contained in checked or unchecked baggage, unless excess valuation has been purchased. These items should be carried by the passenger.

A tariff filed by an air carrier has the force and effect of law. *Bella Boutique Corp. v. Venezolana Internacional de Aviacion, S.A.*, 459 So. 2d 440 (Fla. 3d DCA 1984). Further, a duly filed tariff which limits liability for lost baggage is not only incorporated into the contract with the passenger, but also constitutes the law which governs the air carrier's liability for any loss or damage to property. *Blair v. Delta Air Lines, Inc.*, 344 F. Supp. 360 (S.D. Fla. 1972), *affirmed*, 477 F.2d 564 (5th Cir. 1973); *Feinstein v. Northeast Airlines, Inc.*, 150 So. 2d 487 (Fla. 3d DCA 1963). The Department of Transportation, to whom Congress transferred authority to regulate aviation, has determined that without baggage liability limitations, an airline's exposure for the loss of valuable items, such as jewelry, would add significantly

to airlines' costs, thereby resulting in higher ticket fares. *Complaint against limitation of liability tariffs of Braniff Airways, Inc., and Northwest Airlines, Inc.*, Docket 40373 (U.S. Dep't of Transp. Order Dismissing Complaint issued Dec. 2, 1987). Thus, there is no question as to the validity of the limitation of liability. The issue is whether it was applicable to the facts of this case. We hold that it was.

Ms. Lippert seems to argue that under the emphasized portion of section 1 of her ticket, quoted above, an article only becomes baggage, and therefore triggers the limitation on liability, when it reaches the cargo compartment or the cabin of the aircraft. However, this interpretation would lead to the dubious conclusion that passengers' property in transit to the airplane after being delivered to the airline at the check-in point where tickets are purchased should not be considered baggage. The phrase in the ticket's definition of baggage—"whether checked in the cargo compartment or carried in the cabin . . ."—is more realistically construed as emphasizing that, for purposes of Delta's contract with its passengers, there is no difference between "carry-on" and "checked" baggage. Thus, the ticket's references to the cargo compartment and the cabin are merely descriptive of the words "checked" or "carried," and there can be no doubt that Ms. Lippert's handbag was a passenger's "article or other property . . . acceptable for transportation . . . whether checked or carried . . . ." We believe that a ticketed passenger's property, destined for an airplane and in transit between the airport's security checkpoint and the actual airplane, constitutes "baggage" as defined by the ticket.

In any event, the wording of the tariff would encompass Ms. Lippert's handbag regardless of whether the handbag was characterized as "baggage." Under the emphasized portions of section J(1)(a) of the tariff quoted above, Delta's liability for loss of a fare-paying pas-

senger's baggage or "other property" delivered into the custody of Delta is limited to $1250. Clearly, Ms. Lippert's handbag was delivered into the custody of Delta at the security checkpoint. At that time she was a ticketed passenger, so the baggage liability limitation was applicable.

We cannot accept Ms. Lippert's contention that our interpretation will mean that an article carried by a nonticketed person which had gone through the checkpoint screening process would be subject to the $1250 limitation. Nonticketed persons have not contracted to a limitation of liability as have those persons who purchase tickets. Therefore, the liability for articles of nonticketed passengers would be determined by the ordinary laws of bailment.

We hold that the $1250 baggage limitation of liability was applicable to the loss of Ms. Lippert's handbag while it was in the possession of Delta's agent at the airport security checkpoint.[1] *See Baker v. Lansdell Protective Agency, Inc.*, 590 F. Supp. 165 (S.D.N.Y. 1984) (jewelry at airport security checkpoint held lost "in the course of any of the operations of embarking or disembarking" under the provisions of the Warsaw Convention); *Feature Enters., Inc. v. Continental Airlines*, 745 F. Sup. 198 (S.D.N.Y. 1990) (loss of jewelry case checked with sky cap at curbside prior to embarkation on domestic flight subject to tariff limit of $1250); *but see Tremaroli v. Delta Airlines*, 458 N.Y.S.2d 159 (N.Y. Civ. Ct. 1983) (tariff limitation of liability held inapplicable to property lost at airport security checkpoint because "baggage . . . was never placed on the airplane.").

While we find the $1250 liability limitation applicable in this case, we decline to answer the certified question because it does not precisely track the language of the

[1] Delta has not contended that it should be exonerated from liability for loss of the jewelry under section J(2)(e) of the tariff.

tariff. We agree with the district court of appeal that the bailment created when Ms. Lippert surrendered her handbag for inspection was for the mutual benefit of the passenger and the airline, and we adopt the court's reasoning in this respect. Our disposition of the baggage liability limitation issue renders the cross-petition moot. Because the case was tried under the proper standard of care, there is no need for a retrial. We quash the decision below to the extent that it is inconsistent with our opinion and remand the case for entry of a judgment in favor of Ms. Lippert for $1250.

It is so ordered.

OVERTON, McDONALD, SHAW and HARDING, JJ., concur.

KOGAN, J., concurs in part and dissents in part with an opinion.

BARKETT, C.J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMNED.

KOGAN, J., concurring in part, dissenting in part.

I agree with the majority to the extent it approves a portion of the opinion below. However, I would go further and approve the opinion in full. I agree with the district court's well reasoned conclusion that the tariff and its limitations are not applicable when a passenger relinquishes belongings for a security check prior to boarding aircraft.

The majority's analysis extends the tariff's limitation solely to those security agencies that are contractors of the airline issuing the passenger's ticket. This reduces the tariff's applicability to mere happenstance, since in some instances the security points will not be managed by contractors of the issuing airline and in others the people suffering losses will not hold tickets issued by a contracting airline. The net effect is that the burden of a loss will be shifted primarily to airport authorities, their contractors, or the security companies operating checkpoints, to the extent they are unable to claim the tariff immunity the majority now extends to the airlines' contractors.

For this reason, the economic justifications cited by the majority are not very persuasive. *See* majority op. at 8. Liability will continue to exist in many cases; it merely will be shifted onto parties other than the airline issuing the ticket. This in turn will drive up the costs of operating airports—an expense that sooner or later will be passed on to the airlines and ultimately their passengers, notwithstanding the tariff. If the goal is to keep down costs, as the majority states, *id.*, then this would seem a strange and unfair method of achieving that result.

In terms of real-world effects, the most logical solution to the economic problems noted by the majority either would be (a) holding that the tariff limitations apply to anyone going through an airport security checkpoint, or (b) holding that the tariff limitations do not

apply to airport security checkpoints at all. The first of these approaches cannot be squared with basic contract law, because people are not bound by contracts they have not entered, as the majority notes. Only the second option remains viable.

Accordingly, I would hold that the tariff's limitations do not apply to property going through security checkpoints in airports. The tariff is at best ambiguous on this question, and there is no good reason in law or policy to avoid construing the ambiguity so as to achieve the most logical and fair result.

Notice and Cross-Notice for Review of the Decision of the District Court of Appeal—Certified Great Public Importance

Fourth District—Case Nos. 90-0917 & 90-0932

(Palm Beach County)

Bonita L. Kneeland of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tampa, Florida; Shelley H. Leinicke of Wicker, Smith, Blomqvist, Tutan, O'Hara, McCoy, Graham & Lane, Fort Lauderdale, Florida; and Andrew J. Anthony of the Law Offices of Andrew J. Anthony, P.A., Coral Gables, Florida,

for Petitioners, Cross-Respondents

Jos. D. Farish, Jr. of Farish, Farish & Romani, West Palm Beach, Florida,

for Respondents, Cross-Petitioners

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1991

Case Nos. 90-0917 and 90-0932

THE WACKENHUT CORPORATION and
DELTA AIRLINES, INC., a foreign corporation,
Appellants,

v.

ALBERT LIPPERT and FELICE LIPPERT, his wife,
Appellees.

Opinion filed June 12, 1991

Consolidated appeals from the Circuit Court
for Palm Beach County
Edward D. Rodgers, Judge.

Bonita L. Kneeland of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tampa, for appellant The Wackenhut Corporation.

Shelley H. Leinicke of Wicker, Smith, Blomqvist, Tutan, O'Hara, McCoy, Graham & Lane, Fort Lauderdale, for appellant Delta Airlines, Inc.

Joseph D. Farish, Jr., and Kenneth J. Miller of Farish, Farish & Romani, West Palm Beach, for appellees Albert Lippert and Felice Alpert, his wife.

POLEN, J.

While on her way to board a Delta Airlines flight from West Palm Beach to New York, the appellee and plaintiff below, Felice Lippert, took a handbag containing approximately $431,000 worth of jewelry through a security checkpoint at Palm Beach International Airport. The security checkpoint was operated by The Wackenhut Corporation which was alleged by the plaintiff to be the agent of Delta. The checkpoint consisted of a magnetometer scan of baggage and other carry-on items as well as a scan of the person which occurs as the person walks through a specially designed archway. Mrs. Lippert placed her bag on the conveyer belt as required and she walked through the archway. The archway magnetometer alarm sounded and Mrs. Lippert was briefly inspected by Wackenhut personnel. After being cleared by Wackenhut, Mrs. Lippert discovered her handbag with the jewelry to be missing.

Mrs. Lippert sued Delta and Wackenhut for the value of her jewelry on a theory of negligence. Delta and Wackenhut asserted Delta's limitations of liability as their affirmative defense. The limitations of liability are expressed by reference on the back of Delta's ticket and in full in a governmentally required tariff which is posted according to federal regulations. The limitation contained in the tariff provides (in pertinent part) that:

> J) BAGGAGE LIABILITY
>
> 1) a) DL shall be liable for the loss of, damage to, or delay in the delivery of a fare paying passenger's baggage, or other property (including carry on baggage, if tendered to DL's in flight personnel for storage during flight or otherwise delivered into the custody of DL). Such liability, if any, for the loss damage or delay in the delivery of a fare paying passenger's baggage or other property (Whether checked or otherwise delivered in to the custody

> of DL), shall be limited to an amount equal to the value of the property, plus consequential damages, if any, and shall not exceed the maximum limitation of USD $1250 for all liability for each fare paying passenger (unless the passenger elects to pay for higher liability as provided for in paragraph 3 below). The passenger shall not be automatically entitled to USD $1250 but must prove the value of losses or damages. Actual value for reimbursement of all lost or damaged property shall be determined by the documented original purchase price less any applicable depreciation for prior usage. These limitations also shall apply to baggage or personal property accepted by DL for temporary storage at a city or airport ticket office or elsewhere before or after the passenger's trip.
>
> *2) Exclusions From Liability*
>
> e) DL is not responsible for jewelry, cash, camera equipment, or other similar valuable items contained in checked or unchecked baggage, unless excess valuation has been purchased. These items should be carried by the passenger.

The limitation of liability for baggage damaged, lost or delayed to $1250 was also clearly stated on the ticket held by Mrs. Lippert. Baggage was defined on that ticket as: "any article or other property of passengers which is acceptable for transportation under the conditions of contract stated herein, whether checked in the cargo compartment or carried in the cabin of the aircraft."

The trial court initially entered partial summary judgment for Delta and Wackenhut, upholding the limitation on liability to the maximum amount of $1250. The trial court found that under *Bella Boutique Corp. v. Venezolana Internacional de Aviacion, S.A.*, 459 So.2d 440 (Fla. 3d DCA 1984), the tariff forms the basis for the contract of carriage and has the force and effect of law.

Thus, the trial court found that Mrs. Lippert had delivered her handbag into the custody of Delta through their agents Wackenhut, thereby invoking the limitation on liability.

A new judge was assigned to the case by the time of trial. The trial court, with the second judge presiding, allowed the jury to consider the total amount of damages sustained by the plaintiff and the court further instructed the jury to apportion the damages among the defendants. The judge remarked throughout the trial that he would be bound to enter final judgment in the amount of $1250 at a maximum, notwithstanding what the jury might find. The judge also instructed the jury that the defendants could be held liable for ordinary negligence rather than gross negligence as the defendants had argued.

The jury returned a verdict for the plaintiff in the amount of $431,609, apportioning damages with Delta 65 percent liable and Wackenhut 35 percent liable. After several post-trial motions the trial court, sua sponte, vacated the earlier partial summary judgment and entered final judgment for the plaintiff in the amount of $431,609. The court refused to allow a setoff of this amount or a remittitur despite the fact that Mrs. Lippert recovered $75,000 in insurance proceeds from the loss of a particular pair of earrings which were in the handbag, as well as recovering the earrings themselves in a significantly altered state. The earrings had a trial date value of approximately $40,000.

Delta and Wackenhut appealed the final judgment arguing that the partial summary judgment should have been given its natural effect in limiting liability to $1250. The appellants also argued that the trial court should have either given them the earrings or ordered a set off based on the insurance recovery by Mrs. Lippert. We reverse the final judgment entered by the trial court, and remand for a new trial. We also find, however, that the

original partial summary judgment, limiting appellant's liability to $1250, was erroneous.

While the tariff posted by Delta might form the basis for the contract of carriage and have the force and effect of law under *Bella Boutique*, we find that the limitation of liability contained in the tariff does not apply under the circumstances of this case.[1] The tariff provides that the passenger should carry valuables such as jewelry rather than check such valuables as "baggage." The tariff provides that the passenger is not required to obtain excess value coverage but may elect to do so, thus the passenger can assume sole responsibility for the valuables and is encouraged to do so by the airline.

The problem arises when the passenger must relinquish possession of the valuables upon approaching the magnetometer at the security checkpoint. The passenger then is separated from his or her valuables and it is at this time that a bailment is created. The bailment is obviously for the mutual benefit of the passenger and the airline, and anyone else on or around the airplane or airport for that matter. A bomb exploding the plane or harming other passengers would certainly cause great distress to the airline as well as the passengers who have paid the fare. We are not convinced that the bailment is gratuitous just because federal regulations require the security check to exist. It is for this reason that the trial court was correct in applying the ordinary negligence standard in the case

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[1] We considered many cases from other jurisdictions including the often cited *Tremaroli v. Delta Airlines*, 117 Misc. 2d 484, 458 N.Y.S. 2d 159 (N.Y. Civ. Ct. 1983). All of the foreign cases were distinguishable, some involving the Warsaw Pact which is clearly inapplicable to the case at bar. As for *Tremaroli* we find it unnecessary to rely on the equivalent of a county court case from New York. We feel that the issues presented herein must be resolved in accordance with Florida law and the use of analogy, while not inappropriate, was less effective in this case than in others due to the disparity between the authorities cited and the circumstances surrounding the instant appeal.

at bar. *Armored Car Service Inc. v. First National Bank of Miami*, 114 So.2d 431 (Fla. 3d DCA 1959).

At the time of the creation of the bailment the passenger is in a "Catch-22" situation. The tariff has mandated that the valuables be carried and not placed in "baggage" either checked or unchecked. The tariff has immunized the airline from liability for all baggage including carry-on baggage as soon as the items are in the "custody of DL." The ticket provides that baggage is only baggage when it is either checked or carried into the cabin of the aircraft. Now, the airlines and the security companies working for the airlines attempt to assert these conflicting and confusing limitations at the point before the passenger and his or her "baggage" enters the airplane. There is virtually no responsibility placed on the airline or the security companies to act for the protection of the passenger's belongings. This is not acceptable as a matter of law.

The passenger wants to take his or her valuables on a trip somewhere and the passenger knows that if the airline loses or damages the valuable en route then there is a limitation on liability. The appellant argues that in this case the tariff places the limitations on liability at a point before the bags enter the aircraft, thereby absolving the airline's agents of any real responsibility for their own operations. It must be kept in mind that the passenger, in carrying the handbag, is acting in compliance with the provision of the tariff which states that valuables should be carried.

We hold that the tariff and its limitation on liability do not apply where the passenger is forced to relinquish possession of his or her valuables for the purpose of a security magnetometer check. The airline and the security companies must exercise reasonable care in handling the belongings of the passengers who are merely exercising their right to retain possession of such belongings.

In this case Wackenhut was established as the agent of Delta, which remained undisputed throughout the proceedings below. We realize that in other cases security companies may not stand in this relationship but may rather be independent contractors. If any liability is found it should be apportioned accordingly, depending on the facts of each case which will establish the relationships of the parties. In the case at bar the jury was able to apportion damages after finding that the appellants were both negligent in their handling of Mrs. Lippert's handbag, and but for the prejudicial error discussed below, there would be no reason for another trial on this matter.

It appears that the second trial judge vacated the partial summary judgment previously entered by another judge for no particular reason other than his opinion that the order would be appealed from anyway. The second judge misled the appellant throughout the pretrial proceedings and the trial itself by declaring that the judgment could be entered only in the amount of $1250 at most. This disturbs us, and we hold that the appellants were unduly prejudiced in the trial of their cause, by relying on the partial summary judgment (albeit an erroneous one), and the second judge's frequent pronouncements that the $1250 limitation would prevail.

Finally, we find that the trial court erred in failing to take into consideration the insurance recovery and the recovery of the earrings by the plaintiff. Appellees have conceded that appellants are entitled to *some* offset. The court should have ordered some offset of the final judgment for all or part of the amounts plaintiffs recovered from collateral sources. The damages awarded to the plaintiff should be equal to and precisely commensurate with the loss sustained. *Hanna v. Martin,* 49 So.2d 585 (Fla. 1950). On remand, if appellee prevails on her primary claim, the trial court is instructed to then conduct an evidentiary hearing, and to grant an offset for whatever amount it determines is legally appropriate after considering the evidence and the legal positions of the parties.

The final judgment is reversed and the cause remanded for a new trial, with the proviso that the tariff limitation of liability to $1250 does not apply in this case.

We deem the issues presented in this case to be ones of great public importance, and we therefore certify the following question to the Florida Supreme Court:

> WHERE A POSTED TARIFF IN CONJUNCTION WITH THE TICKET FOR CARRIAGE ON A COMMON CARRIER LIMITS LIABILITY FOR CHECKED BAGGAGE OR BAGGAGE ULTIMATELY DELIVERED TO A FLIGHT ATTENDANT FOR STOWAGE IN THE CABIN, BUT THE PASSENGER CHOOSES INSTEAD TO RETAIN CUSTODY OF A PACKAGE, PURSE, HANDBAG, ETC., AND THE PASSENGER IS THEN REQUIRED TO RELINQUISH POSSESSION OF THE ITEM FOR THE PURPOSES OF X-RAY OR OTHER EXAMINATION OR INSPECTION, DOES THE CARRIER'S TARIFF LIMIT ITS LIABILITY, OR THAT OF ITS AGENTS, FOR ORDINARY NEGLIGENCE RESULTING IN LOSS TO THE PASSENGER DURING THE X-RAY OR INSPECTION PROCESS?

ANSTEAD and GARRETT, J.J., concur.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JULY TERM, 1991

Case Nos. 90-0917 and 90-0932

THE WACKENHUT CORPORATION,
Appellant,

v

FELICE LIPPERT and DELTA AIRLINES, INC.,
a foreign corporation,
Appellees.

Opinion filed October 30, 1991

Consolidated appeals from the Circuit Court
for Palm Beach County
Edward D. Rodgers, Judge

Bonita L. Kneeland of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tampa, for appellant The Wackenhut Corporation.

Shelley H. Leinicke of Wicker, Smith, Blomqvist, Tutan, O'Hara, McCoy, Graham & Lane, Fort Lauderdale, for appellant Delta Airlines, Inc.

Joseph D. Farish, Jr., and Kenneth J. Miller of Farish, Farish & Romani, West Palm Beach, for appellee Felice Lippert.

ON MOTION FOR REHEARING

POLEN, J.

We grant rehearing of our June 12, 1991, opinion in this case only as to the issue of collateral source recovery by the plaintiff and to remove Albert Lippert from the style as indicated by appellee's motion. In all other respects our previous opinion shall remain as previously issued inclusive of the question which we certified to the Supreme Court of Florida.

The Supreme Court of Florida recently decided the case of *Gormley v. GTE Products Corp.*, 16 F.L.W. S655 (Fla. Oct. 10, 1991), in which the issue of collateral source recovery was discussed thoroughly. It is based on the holding of the supreme court in *Gormley* that we grant rehearing in the case at bar.

We note that the issue of admissibility of collateral source recovery was not properly preserved for review in the trial court; however, we have before us the issue of the award to the plaintiff which, under the circumstances of the present case, is substantially intertwined with the applicability of the collateral source rule. At the time of the first trial, neither the trial court nor this court had the benefit of the opinion from the supreme court in *Gormley* and therefore we take this opportunity to instruct the trial court that any evidence of collateral source recovery by the plaintiff is inadmissible for her property loss claim and is per se prejudicial.

The case is remanded for a new trial in accordance with our initial opinion. The trial court is instructed to deal with the issue of collateral source recovery in accordance with this opinion and that of the supreme court in *Gormley*.

ANSTEAD and GARRETT, JJ., concur.

APPENDIX D

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

Case No.: 86-3061 AA

FELICE LIPPERT,

Plaintiff,

vs.

DELTA AIR LINES, INC., and WACKENHUT CORPORATION,

Defendants.

FINAL JUDGMENT

THIS CASE was decided by a jury trial. The Verdict was for the Plaintiff, Felice Lippert, and damages were awarded at $431,609.00, to be apportioned 65% to Defendant, Delta Airlines, Inc., and 35% to Defendant, The Wackenhut Corporation.

Prior to the jury trial, another presiding Judge in this case granted a Summary Judgment in favor of the Defendants. The Summary Judgment limited the damages which could be recovered to $1,250.00.

It appeared to the Court that in the interest of justice and judicial economy and since the issue of damages was so interwoven with the issue of liability that the case should go to trial on the matter of liability and damages. The Jury has rendered its verdict and the Court hereby enters its Final Judgment.

IT IS ADJUDGED that Plaintiff, FELICE LIPPERT, recover from Defendants, DELTA AIR LINES, INC., and WACKENHUT CORPORATION, the sum of Four

Hundred Thirty One Thousand Six Hundred Nine Dollars ($431,609.00), to be apportioned 65% to Defendant, DELTA and 35% to Defendant, WACKENHUT, together with interest from December 14, 1989, and together with costs to be determined at a future hearing. It is further,

ORDERED that execution on the Jury damages award is hereby stayed to allow the Plaintiff to appeal the Summary Judgment limiting her damages to $1,250.00.

The Court reserves jurisdiction for such other matters as may be necessary for the final determination of this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this 1 day of March, 1990.

/s/ Edward Rodgers
EDWARD RODGERS
Circuit Court Judge

APPENDIX E

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

Case No.: 86-3061 AA

FELICE LIPPERT,

Plaintiff,

vs.

DELTA AIR LINES, INC., and WACKENHUT CORPORATION,

Defendants.

AMENDED FINAL JUDGMENT

THIS MATTER came before the Court sua sponte to amend its Final Judgment issued March 12, 1990.

THIS CASE was decided by a jury trial. The Verdict was for the Plaintiff, Felice Lippert, and damages were awarded at $431,609.00, to be apportioned 65% to Defendant, Delta Airlines, Inc., and 35% to Defendant, The Wackenhut Corporation.

Prior to the jury trial, another presiding Judge in this case granted a Summary Judgment on the issue of damages in favor of the Defendants. The Summary Judgment limited the damages which could be recovered to $1,250.00.

At the time of trial, the Court determined that in the interest of justice and judicial economy and since the issue of damages was so interwoven with the issue of liability that the case should go to trial on the matter of liability and damages.

The Court finds itself in a position of conflict as to whether to enter a judgment for $1,250.00 or for $431,609.00. The prior Final Judgment entered was too equivocal to be final, thus necessitating the Amended Final Judgment.

The Court, through its inherent power to decide issues in cases under its jurisdiction, hereby sua sponte sets aside the Summary Judgment entered herein which limited the damages to $1,250.00. The Court is not unmindful that the Summary Judgment was entered by a prior judge assigned to this division.

IT IS ADJUDGED that Plaintiff, FELICE LIPPERT, recover from Defendants, DELTA AIR LINES, INC. and WACKENHUT CORPORATION, the sum of Four Hundred Thirty One Thousand Six Hundred Nine Dollars ($431,609.00), to be apportioned 65% to Defendant, DELTA and 35% to Defendant, WACKENHUT, together with interest from March 10, 1986, together with costs to be determined at a future hearing for all of which let execution issue.

The Court reserves jurisdiction for such other matters as may be necessary for the final determination of this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this 21 day of March, 1990.

/s/ Edward Rodgers
EDWARD RODGERS
Circuit Court Judge

APPENDIX F

SUPREME COURT OF FLORIDA

WEDNESDAY, JANUARY 13, 1993

Case No. 78,957

District Court of Appeal,
4th District—Nos. 90-0917, 90-0932

THE WACKENHUT CORPORATION, ETC., *et al.*,
Petitioners/Cross-Respondents,

v.

ALBERT LIPPERT, *et ux.*,
Respondents/Cross-Petitioners.

Respondents/Cross-Petitioners' Petition for Rehearing filed in the above cause is hereby denied.

OVERTON, McDONALD, SHAW, GRIMES and HARDING, JJ., concur

KOGAN, J., dissents

BARKETT, C.J., recused

A True Copy

TEST

/s/ Illegible
Deputy Clerk
Clerk of Supreme Court

[SEAL]

TC

cc: Hon. Marilyn Beuttenmuller,
Clerk
Hon. Dorothy Wilken, Clerk
Hon. Edward D. Rodgers, Judge

Bonita Kneeland, Esquire
Shelly Leinicke, Esquire
Joe D. Farish, Jr., Esquire
Andrew J. Anthony, Esquire

MANDATE
SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the District Court of Appeal, Fourth District, WHEREAS, in that certain cause filed in this Court styled:

THE WACKENHUT CORPORATION, etc., et al. v. ALBERT LIPPERT, et ux.

Case No. 78,957

Your Case No. 90-0917 & 90-0932

The attached opinion was rendered on December 3, 1992. YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Rosemary Barkett

Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 13th day of January 1993.

[SEAL]

/s/ [Illegible]
Clerk of the Supreme Court of Florida.

APPENDIX G

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PALM BEACH COUNTY
Civil Division

Case No. 86-3061 AA

ALBERT LIPPERT and FELICE LIPPERT, his wife,
Plaintiffs,

vs.

DELTA AIRLINES, INC., a foreign Corporation, and
THE WACKENHUT CORPORATION, a Florida corporation,
Defendants.

COMPLAINT

NOW COME the Plaintiffs, ALBERT LIPPERT and FELICE LIPPERT, his wife, by and through their undersigned counsel, and sue the Defendants, DELTA AIRLINES, INC., a foreign corporation, and THE WACKENHUT CORPORATION, a corporation, and allege:

1. This is an action for damages in excess of $5,000.00.

2. That at all times material hereto the Defendant, DELTA AIRLINES, INC., hereinafter referred to as "DELTA", was and is a foreign corporation, authorized to do business in the State of Florida, and in particular acting as a common carrier for passengers, checked baggage and carry-on baggage and freight, with a terminal at the Palm Beach International Airport in Palm Beach County, Florida.

3. That the Defendant, THE WACKENHUT CORPORATION, hereinafter referred to as "WACKENHUT",

is a Florida corporation, authorized to do business in the State of Florida, and through its agents, servants and employees was acting as the agent of the Defendant, DELTA AIRLINES, for the purpose of checking carry on baggage, security and passengers boarding Delta Airline flights from the terminal at the Palm Beach International Airport, Palm Beach County, Florida.

4. That on or about March 8, 1986, Plaintiffs purchased tickets from the Palm Beach International Airport to New York, New York, Laguardia Terminal, from the Defendant, DELTA, and proceeded to the Delta terminal and checked their baggage and were in the process of proceeding to board the aircraft designated by DELTA for their passage.

5. That at the aforesaid time and place, as a requirement for boarding said aircraft, DELTA, caused Plaintiffs to place their carry-on baggage on a conveyor belt to be x-rayed and/or surveilled before allowing Plaintiffs to board its aircraft.

6. That Plaintiffs placed their hand baggage, including a small Louis Vuitton on the conveyor belt for the purpose of said security surveillance and proceeded to go through the personal security check to check their persons.

7. That after clearing the personal security surveillance Plaintiffs proceeded to recover their personal hand baggage being inspected and surveilled and determined that the aforesaid Louis Vuitton handbag was missing.

8. That Plaintiffs immediately demanded the possession of said handbag from the Defendant, DELTA, through its agents, servants and employees, which was refused and has been continuously refused even though demand has been repeatedly made.

9. That Defendant, WACKENHUT, through its agents, servants and employees, was operating the surveillance

equipment, including the x-ray machine, which was allegedly checking Plaintiffs' carry-on baggage including the aforesaid Louis Vuitton handbag.

10. The Plaintiffs have repeatedly demanded the return of the said Louis Vuitton handbag from the Defendand, WACKENHUT, which has been refused.

11. That Plaintiffs entrusted their personal carry-on baggage to the Defendants and were required to do so before boarding Defendant, DELTA's, aircraft to proceed on their journey to New York.

12. That Defendants had a duty to safely return to Plaintiffs their carry-on baggage, including the contents thereof, and which duty they have failed to fulfill and have breached.

13. That the Defendants during the course of inspecting and surveilling Plaintiffs' carry-on baggage aforesaid, through their agents, servants, and employees, negligently and carelessly handled and/or supervised said inspection and surveillance thereby losing same during the course of their exclusive possession.

14. That in addition to losing the aforesaid Louis Vuitton handbag, Plaintiffs have lost numerous items of personal property therein, including but not limited to a substantial amount of precious jewelry and stones, having a fair market value in excess of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS, and an additional extrinsic value in a like amount.

15. That Plaintiffs have been deprived of the use and enjoyment of said personal property together with the emotional loss related thereto.

WHEREFORE, Plaintiffs demand damages of and from the Defendants, DELTA AIRLINES, INC., and THE WACKENHUT CORPORATION, in a sum in excess of

Five Thousand ($5,000.00) Dollars, together with costs, expenses, and attorneys' fees and demand trial by jury.

/s/ Jos. D. Farish, Jr.
Jos D. FARISH, JR.
Of Counsel

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